SUBJECT INDEX.

PAGE

Preface 1

Summary of argument 2

Argument 3

Point I. The trial court decided that custodian had no interest in this controversy sufficient to enable him to assert any defense to respondents' claims to interest. Petitioner McGrath in his petition for certiorari did not seek a review of its decision upon that point and, accordingly, the petition of McGrath should be denied 3

Point II. The petitioner Superintendent of Banks argued in the trial court that Section 5(b) (2) of the Trading with the Enemy Act was inapplicable to the questions at issue in this case. He cannot now be heard to urge its applicability as a ground for reversal of the decision below 7

Point III. After December 27, 1941, there was no Federal impediment to payment of respondents' claims in the liquidation proceedings and the exculpatory clauses of the Trading With the Enemy Act are therefore inapplicable 9

Point IV. This court should not grant a petition of certiorari to review the findings of fact of the court below to the effect that the Bank and its officers lacked the "good faith" required by Section 5(b) (2) of the Trading With the Enemy Act 12

TABLE OF AUTHORITIES CITED.

CASES PAGE

Carpet, Linoleum and Resilient Floor Decorators Union v. Dayton Company, 94 L. Ed. Adv. Sheets (No. 10) 454..... 11

Connecticut Railway & Lighting Co. v. Western Electric Co., 305 U. S. 493..... 4

Fujikawa v. Sunrise Soda Water Works, 158 F. 2d 490; cert. den., 331 U. S. 832; reh. den., 332 U. S. 785; app. to file second petition den., 332 U. S. 853.....14, 16

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175.....4, 17

Great Northern Railway v. Sutherland, 273 U. S. 182..... 6

Greva v. Rainey, 2 Cal. 2d 338..... 11

Matheson v. Hicks, 10 F. 2d 872..... 6

McGowan v. McDonald, 111 Cal. 57..... 11

Miller v. Rouse, 276 Fed. 715..... 6

Ohio ex rel. Seney v. Swift & Co., 260 U. S. 146..... 8

Paramount Pictures, Inc. v. Clark, 93 A. C. A. 917..... 15

People v. California Safe Deposit & Trust Co., 34 Cal. App. 269 11

Rorick v. Devon Syndicate Ltd., 307 U. S. 299..... 4

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508..... 16

State of Maryland v. Baltimore Radio Show, 94 L. Ed. Adv. Sheets (No. 5) 240..... 11

Sutherland v. Guaranty Trust Co., 11 F. 2d 696..... 6

United States v. Johnson, 268 U. S. 220..... 16

STATUTES

Alien Property Custodian Vesting Order 1324.....4, 5, 6

Trading With the Enemy Act, Sec. 5(b)..... 7

Trading With the Enemy Act, Sec. 5(b) (2).....2, 12, 16

IN THE

Supreme Court of the United States

October Term, 1949
Nos. 594 and 613.

No. 594

J. HOWARD McGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, LOEW'S INCORPORATED, a Delaware Corporation, and UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation,

Respondents.

No. 613

MAURICE C. SPARLING, Superintendent of Banks of the State of California, as Liquidator of the Business and Property of THE YOKOHAMA SPECIE BANK, LTD., San Francisco, with a Branch in Los Angeles, in Liquidation,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a National Banking Association), LOEW'S INCORPORATED (a Delaware Corporation), and UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation,

Respondents.

Answer of Respondents, Bank of America National Trust and Savings Association, Loew's Incorporated and Universal Pictures Company, Inc., to Petitions for Certiorari.

Preface.

Respondents, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, LOEW'S INCORPORATED and UNIVERSAL PICTURES COMPANY, INC., will be sometimes referred to as "respondents"; petitioner, J. HOWARD McGRATH, Attorney General of the United States, as Successor to the Alien Property Custodian, will be some-

times referred to as "McGRATH"; the Superintendent of Banks of the State of California will be sometimes referred to as the "Superintendent of Banks"; the Alien Property Custodian will sometimes be referred to as the "Custodian"; the Yokohama Specie Bank, Ltd., with a Branch in Los Angeles, in liquidation, will sometimes be referred to as the "Bank" and the District Court of Appeal of the State of California as the "Appellate Court."

Summary of Argument.

The petitions for certiorari of McGRATH and of the Superintendent of Banks should be denied because:

1. The trial court decided that the Custodian had no interest in this controversy sufficient to enable him to assert any defense to respondents' claims to interest. Petitioner McGRATH in his petition for certiorari did not seek a review of its decision upon that point, and accordingly, the petition of McGRATH should be denied.

2. Petitioner Superintendent of Banks argued in the trial court that Section 5(b) (2) of the Trading With the Enemy Act was inapplicable to the questions at issue in this case. He cannot now be heard to urge its applicability as a ground for reversal of the decision below.

3. After December 27, 1941 there was no Federal impediment to payment of respondents' claims in the liquidation proceedings and the exculpatory clauses of the Trading With the Enemy Act are therefore inapplicable.

4. This court should not grant a petition of certiorari to review the findings of fact of the court below to the effect that the bank and its officers lacked the "good faith" required by Section 5(b) (2) of the Trading With the Enemy Act.

ARGUMENT.

POINT I.

The Trial Court Decided That Custodian Had No Interest in This Controversy Sufficient to Enable Him to Assert Any Defense to Respondents' Claims to Interest. Petitioner McGrath in His Petition for Certiorari Did Not Seek a Review of Its Decision Upon That Point and, Accordingly, the Petition of McGrath Should Be Denied.

The trial court ruled that the Alien Property Custodian had no interest in the controversy and was not a proper plaintiff. In its Conclusion of Law No. 4, in each case the court declared:

> "Plaintiff in intervention, as successor to the Alien Property Custodian, has no claim in or to any funds remaining in the hands of said Superintendent of Banks which may be available for the payment of interest as prayed in Plaintiff's complaint herein, and his claims are not adverse to the claims of plaintiff herein; and plaintiff in intervention is not a proper plaintiff in intervention in this action, and he has no interest in this controversy whatever, either sufficient to enable him to assert any defense to plaintiff's claim for interest herein, or otherwise, or at all." [Rec. pp. 66, 104, 141.]

This Conclusion of Law was based on the finding of fact that:

> "15. * * * In and by said Vesting Order No. 1324 said Alien Property Custodian did not vest in himself the excess proceeds, if any, of the business and property of the California Branches of The

Yokohama Specie Bank, Ltd. in the possession of the Superintendent of Banks of the State of California remaining after payment of the principal of the claims of the creditors of said California Branches accepted, allowed or established in accordance with the banking law of the State of California in so far as the same might be available for the payment of interest at the rate of seven per cent (7%) per annum upon the principal of said claims from the date of suspension of business, namely, December 8, 1941 (except where under the terms of the contract out of which the claim arose the due date was subsequent to the date of suspension of business in which event interest would commence to run from the due date) until the date of payment of principal." [Rec. pp. 64, 102, 139.]

Petitioner McGrath in his petition for certiorari having failed to ask this court to review the foregoing finding and conclusion of the trial court this court will not under its long established practice review that determination and McGrath's petition for certiorari should be denied.

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 177;

Connecticut Railway & Lighting Co. v. Western Electric Co., 305 U. S. 493;

Rorick v. Devon Syndicate Ltd., 307 U. S. 299, 303.

The determination of the trial court that the Alien Property Custodian by his vesting order No. 1324 had not vested in himself the amounts necessary to pay interest

upon the claims of depositors, was correct. The vesting language of the order was:

"4. Finding, therefore, that the property described as follows:

The excess proceeds * * * owned or controlled by or payable to deliverable to or held on behalf of or on account of or owing to the California Branch *remaining after payment of the claims of the creditors of the California Branch accepted, allowed or established in accordance with the banking law of the State of California, arising out of the business of the California Branch transacted in the State of California,* TOGETHER WITH INTEREST* on such claims and the expenses of liquidation, is property within the United States owned or controlled by a national of a designated enemy country (Japan), and also is property which is payable or deliverable to, or claimed by, a national of a designated enemy country (Japan) * * *.

7. Deeming it necessary in the national interest: hereby vests in the Alien Property Custodian the property hereinbefore described in subparagraph 4, * * *." [Rec. pp. 13-14, 178.]

Vesting Order 1324 continued:

"* * * provided, however that after the claims of the creditors of the California Branch described in subparagraph 4 hereof, *together with interest thereon*

---

*Emphasis here, as elsewhere, has been added unless otherwise noted.

> and the expenses of liquidation, have been paid in full, the remaining assets of the California Branch, or the proceeds thereof, in the possession of said Superintendent of Banks * * * shall be held for the account of and subject to the further order of the Alien Property Custodian." [Rec. pp. 14, 178.]

Vesting Order 1324 clearly limited the property thereby vested in the Alien Property Custodian to the excess proceeds in the possession of the Superintendent of Banks remaining after the payment of claims of depositors and interest on such claims.

It is too well settled to be the subject of controversy that the interest of the Alien Property Custodian is defined and limited by his vesting order.

> *Great Northern Railway v. Sutherland,* 273 U. S. 182;
>
> *Miller v. Rouse,* 276 Fed. 715;
>
> *Matheson v. Hicks,* 10 F. 2d 872;
>
> *Sutherland v. Guaranty Trust Co.,* 11 F. 2d 696.

For both of the foregoing reasons McGRATH is not entitled to a review by this court.

POINT II.

The Petitioner Superintendent of Banks Argued in the Trial Court That Section 5(b) (2) of the Trading With the Enemy Act Was Inapplicable to the Questions at Issue in This Case. He Cannot Now Be Heard to Urge Its Applicability as a Ground for Reversal of the Decision Below.

The Superintendent of Banks at the trial took the position that Section 5(b) of the Trading With the Enemy Act as amended was inapplicable.

At page 492 of the record the Superintendent of Banks, through his counsel, stated to the court:

> "Fourthly, the Superintendent does not believe that the exculpatory clause in Section 5 B of the Trading with the Enemy Act as amended in 1941 is applicable. We do not see in that section any language that can be said to have any bearing on this case."

And at page 493 of the record he continued:

> "Now, the only portion of this exculpatory clause that could be applicable is the second portion, which provides that no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of or in pursuance of or in reliance on Section 5 B or any regulation, instruction, or direction issued thereunder.
>
> Now, for just a moment let us query; did the bank or its management omit to do business or to pay depositors in pursuance of or in reliance in good faith on some Federal order in public circular issued under

Section 5 B or some executive order issued thereunder? The answer to that question is that the omission of the bank and its officers was not pursuant to Section 5 B, in the first instance, and since the Superintendent of Banks had already closed the banks and prevented any officer from reopening ten days before Section 5 B 2 became law, also the bank's officers omitted to open the bank because they were incarcerated under some other Federal authority and it was physically impossible for them to open the bank, and *I don't think this section is applicable.*"

The Superintendent of Banks, having taken the position in the trial court that Section 5(b) of the Trading With the Enemy Act was inapplicable, cannot now seek to review the judgment upon the sole ground that Section 5(b) is applicable.

Ohio ex rel. Seney v. Swift & Co., 260 U. S. 146, 149.

The petition for certiorari of the Superintendent of Banks should be denied.

POINT III.

After December 27, 1941 There Was No Federal Impediment to Payment of Respondents' Claims in the Liquidation Proceedings and the Exculpatory Clauses of the Trading With the Enemy Act Are Therefore Inapplicable.

The bank was closed on December 7, 1941 as the result of two independent causes. The Superintendent of Banks took physical possession of the Bank [Finding of Fact No. 10, Rec. pp. 61, 99; Finding of Fact No. 11, Rec. p. 136], the Secretary of the Treasury revoked its license to do business [Finding of Fact No. 9, Rec. pp. 61, 99; Finding of Fact No. 10, Rec. p. 136].

Immediately thereafter and on December 18, 1941 petitioner Superintendent of Banks applied for a Federal license to authorize, among other things, payments to the depositors of the Bank [Rec. p. 260]. Upon this application and on December 27, 1941 licenses were duly issued to the Superintendent of Banks [Exhibits 7 and 8, Rec. p. 199] which provided as follows:

> "As Superintendent of the Banks of the State of California, and in accordance with the laws of said state, you are hereby authorized to effect all transactions ordinarily incidental to the liquidation of the property and business of the Los Angeles Branch of The Yokohama Specie Bank, Ltd. (The Yokohama Shokin Ginko) *including payments to depositors,* sales of securities, delivery of collateral, salaries and all other transactions appropriate to the orderly liquidation." [Exhibits 7 and 8, Rec. p. 199.]

The effect of these licenses was summarized at the trial by the attorney for the Superintendent of Banks at page 491 of the record as follows:

> "Now, on December 27, 1941, the Secretary of the Treasury granted to the California conservator a license to liquidate the business and property of the bank. Irrespective of what the actual situation was for a period of nineteen days from the 8th day of December, 1941 to the 27th day of December, 1941, on the latter date and thereafter the conservatorship and liquidation of the affairs of this bank was in no different condition or status than any ordinary domestic bank in liquidation.
>
> At least on that date it became a pure and simple bank liquidation, with the conservator and/or liquidator obliged by law to marshall all the funds, moneys, and assets due and owing to the bank, in order to pay a dividend to depositors and other creditors.
>
> I wish also to point out at this time to your Honor's attention that the Superintendent of Banks could have, under Section 135 C of the Bank Act, that is, the conservatorship, forthwith ordered a partial distribution to creditors or made available funds for withdrawal, but such distribution must be on a ratable basis to all creditors, and even if Paramount Pictures, one of the plaintiffs in these proceedings, had obtained a license to receive payment of its deposit during conservatorship proceedings, no such payment would have been made to any single depositor by the conservator, unless he had sufficient funds to make ratable distribution to all." [Rec. pp. 491-492.]

From December 27, 1941, the date of these licenses, no Federal order prevented payment to the respondents by the Superintendent of Banks [Rec. p. 488]. Payment was delayed only by the ordinary processes of liquidation, not by any order of the Secretary of the Treasury or of any other Federal authority. Under well established decisions by California courts interest is payable to depositors in liquidation if a surplus is available for that purpose.

Greva v. Rainey, 2 Cal. 2d 338;

McGowan v. McDonald, 111 Cal. 57;

People v. California Safe Deposit & Trust Co., 34 Cal. App. 269.

The decision which is sought to be reviewed is thus supportable on a non-Federal ground and the petitions for certiorari should, therefore, be denied.

State of Maryland v. Baltimore Radio Show, 94 L. Ed. Adv. Sheets (No. 5) 240, 243.

Carpet, Linoleum and Resilient Floor Decorators Union v. Dayton Company, 94 L. Ed. Adv. Sheets (No. 10), page 454.

POINT IV.

This Court Should Not Grant a Petition of Certiorari to Review the Findings of Fact of the Court Below to the Effect That the Bank and Its Officers Lacked the "Good Faith" Required by Section 5(b) (2) of the Trading With the Enemy Act.

The trial court concluded that the officers of the Bank had an obligation to attempt to obtain a license authorizing it to continue business or to pay its depositors and that the failure to take either step evidenced an absence of the "good faith" required to make Section 5(b) (2) of the Trading With the Enemy Act applicable.

Despite the internment of the officers of the Bank, the trial court found:

> "11. * * * there was nothing to deter or prevent them, or any of them, or their attorneys or agents, from applying to the proper Federal Reserve Bank for a special license to continue the business of The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, after December 8, 1941, or for a special license to pay plaintiff the amount of its deposits after said date, or, in the event that said application or applications were denied, from appealing from the denial of the same to the Secretary of the Treasury pursuant to Executive Order No. 8389, as amended, and the regulations thereunder; or from applying to the above entitled court (the Superior Court) on or after December 8, 1941, to enjoin further proceedings against the Bank by the Superintendent of Banks of the State of California pursuant to Section 136 of the California Bank Act; or from attempting to obtain the consent of said Super-

intendent of Banks pursuant to Section 136 of said Bank Act that the Bank might resume business upon such conditions as he might approve. Notwithstanding, neither the bank nor any officer, director, agent or person acting on its behalf (excluding the Superintendent of Banks of the State of California) ever made application to the Secretary of the Treasury pursuant to Executive Order No. 8389, as amended, or to the Treasury Department or its Foreign Funds Control Division, or to any Federal Reserve Bank, for a specific Treasury Department license or licenses to continue the business of the Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, after December 8, 1941, or for a specific Treasury Department license or licenses permitting said Bank, after December 8, 1941, to engage in any transaction prohibited by said Executive Order, such, for example, as a license authorizing payment to plaintiff of its deposits. Moreover, none of the above mentioned persons ever applied to the above entitled Court on or after December 8, 1941, to enjoin further proceedings against said Bank by the Superintendent of Banks of the State of California pursuant to Section 136, or any other provision of said Bank Act; nor did any of said persons ever seek to obtain the consent of said Superintendent of Banks pursuant to Section 136, or any other provision of said Bank Act that said Bank might resume business upon such conditions as might be approved by said Superintendent of Banks." [Finding of Fact No. 11, Rec. pp. 62-63, 100; Finding of Fact No. 12, Rec. p. 137.]

Based upon this finding of fact the trial court concluded:

"3. Mitsuhiro Motoyoshi, Manager, Yutaka Takase, sub-Manager, Keitara Daigo, pro-Manager, Shokochi Uno, pro-Manager, the officers of The

Yokohama Specie Bank, Ltd., San Francisco Branch, as of December 7, 1941, and each of them, had an obligation to plaintiff to attempt to obtain a license authorizing The Yokohama Specie Bank, Ltd., San Francisco, with a branch in Los Angeles, to continue business after December 8, 1941, or a license authorizing payment to plaintiff of its deposits after said date, pursuant to Executive Order No. 8389, as amended, and the regulations thereunder; *and the failure of said officers, and each of them, to discharge said obligation showed an absence of 'good faith' of Section 5(b) (2) of the Trading with the Enemy Act, as amended by the First War Powers Act,* December 18 1941, c. 593 Title III, Sec. 301(2), 50 U. S. C. A., App., Sec. 616 (2)." [Conclusion of Law No. 3, Rec. pp. 66, 103, 141.]

The foregoing finding of fact and conclusion of law were based upon the decision rendered by the United States Court of Appeals for the Ninth Circuit, in *Fujikawa v. Sunrise Soda Water Works,* 158 F. 2d 490, certiorari denied 331 U. S. 832; application for rehearing denied 332 U. S. 785; application to file second petition denied 332 U. S. 853.

In the *Fujikawa* case the court said at page 492:

"There was an obligation of the officers of the bank to the depositors to attempt to obtain from the Secretary of the Treasury a license for a limited operation of the bank which would permit the deposit and withdrawal of moneys, as such action was permitted to the two finance companies and the insurance company which applied for and procured such licenses."

And based upon the foregoing reasoning concluded at page 494:

> "Failure of the bank's officials in the discharge of such an obligation to the depositors shows an absence of 'good faith' of Section 5(b) (2) of the Trading With the Enemy Act, as amended by Sec. 301 of the First War Powers Act, 1941, 55 Stat. 838,"

The Appellate Court in the case at bar, in refusing to disturb the finding of the trial court quoted above, stated:

> "We are asked to hold that this finding and conclusion (that the officers of the bank could have applied for a license or to open the bank and that their failure to do so evidenced the necessary 'good faith') are not supported by the evidence, it being pointed out that in the Fujikawa case above quoted from there was no showing that the officers of the bank were interned. The inferences and conclusions from the evidence are for the trial court to draw and in view of the evidence produced on cross-examination establishing the power of the officers of the bank after internment to make application for a license we cannot hold that the finding and conclusion of the trial court on this subject are not supported by the evidence."
>
> *Paramount Pictures, Inc. v. Clark,* 93 A. C. A. 917, 922.

Summarizing the evidence in the case at bar, and the decision that the Alien Property Custodian had presented insufficient evidence to distinguish the case at bar from the *Fujikawa* case, the Appellate Court said at page 922:

> "Faced with this adjudication (the Fujikawa case) the intervener in the cases before us produced an

immigration officer who testified that the officers of the bank in San Francisco were immediately on December 7, 1941 taken into custody and interned. However on cross-examination this witness stated that these officers would have been permitted to consult with an attorney if they had desired, that they would have been permitted to make application to the Secretary of the Treasury for a license to pay the creditors of the bank and that they would have been permitted to go out with an armed guard if the authorities 'felt there was a good reason.' The trial court found that there was nothing to prevent these officers from applying for a special license to pay the creditors of the bank or these plaintiffs and as a conclusion of law that their failure to do so showed an absence of 'good faith' of section 5(b) (2) of the Trading With the Enemy Act."

The Appellate Court accordingly affirmed the decision of the trial court that the officers of the Bank lacked the good faith required by Section 5(b) (2) of the Trading With the Enemy Act.

Petitioners by their separate petitions for certiorari seek a review of this determination. No substantial question of law is involved. This court three times refused to review the determination in *Fujikawa v. Sunrise Soda Water Works,* 158 F. 2d 490, which furnishes a determining precedent.

Questions of fact are ordinarily not reviewed by this court especially where there is substantial evidence in the record to support the decision of the state court.

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508;

United States v. Johnson, 268 U. S. 220.

Cf.:

General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 178.

The petitions for certiorari of McGRATH and of the Superintendent of Banks should be denied.

Respectfully submitted,

WALTER S. HILBORN,

Attorney for Respondents, Bank of America National Trust and Savings Association, Loew's Incorporated and Universal Pictures Company, Inc.

LOEB AND LOEB,

Of Counsel.